AUTHORITIES CITED

Cases: Page

Atlantic Life Ins. Co. v Wolf (Mun Ct App Dist Col) 54 A2d 641 (1947) 6

Dick v New York Life Ins. Co., 359 US 437, 3 L Ed2d 935, 79 S Ct 921 (1959) 2

Feldman v Kings Highway Sav. Bank, 278 App Div 589, 102 NYS2d 306, affd 303 NY 675, 102 NE2d 835 (1951) 6

Magnum Import Co. v Coty, 262 US 159, 67 L Ed 922, 43 S Ct 531 (1922) 3

Reich v Pine Lawn Bank & Trust Co. (Mo App) 356 SW2d 545 (1962) 7

Smith v Reinauer Oil Transport, Inc. (CA 1 Mass) 256 F2d 646 (1958) 3

Smithwick v Whitley, 152 NC 366, 67 SE 914 (1910) 7

United States v Johnson, 268 US 220, 69 L Ed 925, 45 S Ct 496 (1924) 3

Other:

75 ALR2d 1265 (1961) Usury as Affected by Repayment or Borrower's Option to Prepay Loan Before Maturity 6

45 Am Jur 2d 147, Interest and Usury, §184, note 8 7

Work of the Federal Courts by Hon. Fred M. Vinson, 69 S Ct v, vi (1949) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1237

SERVICE INVESTMENT CO., INC.,
Petitioner,

vs.

STATE MUTUAL LIFE ASSURANCE COMPANY OF AMERICA,
Respondent.

BRIEF IN OPPOSITION TO A PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Service Investment Co., Inc. has petitioned for a Writ of Certiorari to review the judgment of the Court of Appeals for the Sixth Circuit entered in the above entitled case on November 18, 1972.

The Respondent, State Mutual Life Assurance Company of America, prays that the Petition for a Writ of Certiorari be denied and submits the following in opposition to said petition:

ARGUMENT

I.

Petitioner has asserted no reasons for granting the Writ of Certiorari which fall within one of the traditional classes set forth in Supreme Court Rule 19.

(a) There is no showing that there is a conflict with any other Circuit Court of Appeals;

(b) There is no showing that the question presented is sufficiently important or novel for the Supreme Court to review;

(c) There is no showing that the lower court has departed so far from the usual course of judicial proceedings that the decision calls for an exercise of the Supreme Court's supervisory powers.

In addition, there is no constitutional issue involved in this case which warrants review by certiorari. Petitioner claims it was denied the right to have a jury determine certain factual issues, which right was denied by the granting of Respondent's Motion for Summary Judgment. At the outset, it should be noted that Petitioner also moved for a Summary Judgment contending that there were no factual issues. But even if we assume there conceivably were some fact issues, this alone is not enough to warrant certiorari. The right to have material factual questions determined by a jury is a well settled proposition. It is not an issue which is novel, unsettled or important enough to warrant further consideration. The trial judge and the Court of Appeals found there were no such issues. As in *Dick* v *New York Life Ins. Co.*, 359 US 437, 3 L Ed 2d 935, 79 S Ct 921 (1959), where the petition for certiorari sets forth the question whether Petitioner was de-

prived of her constitutional right to a jury trial guaranteed by the Seventh Amendment, Justice Frankfurter, in a separate opinion, attempted to delineate the policy of the Supreme Court at page 947 by quoting from *Smith* v *Reinauer Oil Transport, Inc.* (CA 1 Mass) 256 F 2d 646 (1958) as follows:

> "If an appellate court is of the view that the trial court made an error of judgment in withdrawing a case from the jury, or in entering judgment for the defendant notwithstanding a plaintiff's verdict, a reversal [by a Court of Appeals] is no doubt called for; but we cannot see that anything is gained by blowing up that error of judgment into a denial of the constitutional right to a jury trial as guaranteed by the Seventh Amendment."

The question raised by Petitioner as to whether there were material questions of fact present in this case would demand that the Supreme Court look at the facts to determine their materiality. This is not a proper question for review by the Supreme Court. It traditionally has been the policy of the Supreme Court to deny certiorari when review is sought solely upon an analysis of the particular facts involved. In *United States* v *Johnson,* 268 US 220, 69 L Ed 925, 45 S Ct 496 (1924), the court said at page 926:

> "We do not grant a certiorari to review evidence and discuss specific facts."

It has been reiterated numerous times that a writ of certiorari will not issue merely to accord another hearing to the party defeated in the court of appeals. In a typical case in which this proposition is stated, *Magnum Import Co.* v *Coty,* 262 US 159, 67 L Ed 922, 43 S Ct 531 (1922), the Court has set forth the basic principles to be considered when reviewing a petition for certiorari at page 924 as follows:

> "The question how the court should exercise this power next arises. The jurisdiction to bring up cases by certiorari from the circuit courts of appeals was given for two purposes: first, to secure uniformity of decision between those courts in the nine circuits; and, second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing."

The only contention of Petitioner is that the lower courts (both District and Court of Appeals) made an error in granting and upholding Respondent's Motion for Summary Judgment. It has been repeatedly held by this court that alleged error alone is not enough to assure certiorari. The Supreme Court is not primarily concerned with the correction of errors in lower court decisions as was stated by former Chief Justice Vinson in an address before the American Bar Association on September 7, 1949 entitled "Work of the Federal Courts" as reported at 69 S Ct, pages v, vi:

> "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights & uniformity of Jdgmts.' The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have

> arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."

Furthermore, there is no error in either of the lower courts decisions in this case.

II.

The decision of the lower court in this case is clearly correct and thus does not require review. The issue presented was very simple: Did the Respondent's demand for a prepayment premium after the time within which any waiver of premium had expired constitute usury? The Respondent, the Federal District Court and the Circuit Court of Appeals all agreed that this did not constitute usury as a matter of law. At no time was Petitioner required to prepay the loan which is the subject matter of the controversy in this case. As a matter of law, it is elementary that the payment of such a premium could not be considered usurious whether the amount was considered in the calculation of interest or whether the amount is not interest and merely terminates the loan contract.

It is well settled that where a lender requires the payment of a bonus or premium for payment prior to maturity, it is not interest. Numerous cases have held that

the money paid as a penalty or bonus for prepayment of a loan before maturity was not paid as interest on the loan but to secure the release of the contract. In a leading comment in 75 ALR2d 1265 (1961) the validity of this decision is stated at page 1267:

> "A prepayment premium required by the lender as condition for accepting the borrower's proposed termination of the loan before its maturity, the contract making no provision for such contingency, was held in *Atlantic Life Ins Co* v *Wolf* (1947), (Mun Ct App Dist Col) 54 A2d 641, not to be interest: It was said that the transaction was the very reverse of a loan, putting an end to credit instead of giving it, and that it was not tainted with usury.
>
> A 'prepayment privilege charge' required by the defendant bank from the plaintiff borrower who wanted to terminate his indebtedness 4 years before the earliest possible time provided therefor in the loan contract did not constitute usury, said the court in *Feldman* v *Kings Highway Sav. Bank* (1951) 278 App Div 589, 102 NYS2d 306, affd 303 NY 675, 102 NE2d 835, since such charge was neither required nor given in consideration of the making of the loan or of forbearance of money, but, on the contrary, for the making of a new and separate agreement, the termination of the indebtedness, and was accordingly not a payment of interest which might provide the basis for a claim of usury."

It is clear that since a bonus or prepayment penalty is not exerted for the use of money, rather to determine a debt, it is not interest.

As a general rule, absent a prepayment privilege, there is no right of prepayment of a note with interest to the date of payment prior to maturity. In fact, it is generally held that where repayment of a loan is made before maturity, the lender may receive interest to the stipulated maturity date without making itself guilty of usury.

We call your attention to an additional comment in 45 Am Jur 2d 147, Interest and Usury, §184, note 8, where it is stated:

> "Where there is no optional prepayment clause in a note, it is not usurious for a lender to require the payment of interest, or a part thereof, to the date of the maturity of the note, even though the debt is paid before maturity and the amount paid exceeds lawful interest computed to the date when the loan was paid. *Reich* v *Pine Lawn Bank & Trust Co* (Mo App) 356 SW2d 545.
>
> In *Smithwick* v *Whitley,* 152 NC 366, 67 SE 914, where a borrower sought to pay a series of notes secured by a mortgage some years before the maturity dates of several of such notes, and the lender refused to accept payment of the notes not due unless the borrower paid interest in full to the maturity of each note, which amount the borrower thereupon paid, and then sued the lender for usury on taking such 'unearned interest,' it was held that the lender had not taken usury."

The general rule for testing the validity of a prepayment premium is set forth at 75 ALR2d 1268 (1961) as follows:

> "If, pursuant to a prepayment option in a loan contract, a loan is voluntarily paid before its maturity, the contract will not be rendered usurious in a case in which the total interest received by the lender is not in excess of the interest computed at the maximum lawful rate from the time the loan began to the absolute maturity specified in the contract."

Despite Petitioner's contention that the Court erred in determining certain questions of fact, both the District Court (on motion for rehearing) and the Appellate Court (on appeal and on motion for rehearing), after lengthy

arguments and careful review, determined that Petitioner failed to present any genuine issue of fact which would require the court to reverse its decision.

Accordingly, and for the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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